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IN THE

Supreme Court of the United States

THE REPUBLIC OF CONGO, CMS NOMECO CONGO INC., THE NUEVO CONGO COMPANY, AND NUEVO CONGO LTD.,

Petitioners,

v.

AF-CAP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court of appeals has authorized the garnishment by a judgment creditor of the Republic of Congo's right to receive its royalty share of oil, which is produced, stored and delivered within the Republic of Congo (the "Congo"). The Fifth Circuit held that the Congo's right to receive royalty oil in Congolese territory is property that is "in the United States" for purposes of the attachment and execution provisions of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1610(a). This case presents the following question:

Whether a foreign state's right to receive, in its own territory, a royalty share of oil produced by oil companies operating in the foreign state, is property that is located "in the United States" under the FSIA because the oil companies owing the royalty obligation are located in the United States?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Fifth Circuit, whose judgment in consolidated Case Nos. 03-50506 and 03-50560 is sought to be reviewed, were as follows:

Petitioner The Republic of Congo was Defendant-Appellee;

Petitioners CMS Nomeco Congo Inc., The Nuevo Congo Company, and Nuevo Congo Ltd. were Garnishees-Appellees;

Respondent Af-Cap, Inc. was Plaintiff-Appellant.

RULE 29.6 STATEMENT

Petitioner CMS Nomeco Congo Inc. is a subsidiary of Perenco Oil and Gas (International) Company, which is privately owned. There is no publicly-held company that owns 10% or more of the stock of CMS Nomeco Congo Inc.

Petitioner The Nuevo Congo Company is a subsidiary of The Congo Holding Company, which is privately owned. There is no publicly-held company that owns 10% or more of the stock of The Nuevo Congo Company.

Petitioner Nuevo Congo Ltd. is a subsidiary of Lankan Inc., which is privately owned. There is no publicly-held company that owns 10% or more of the stock of Nuevo Congo Ltd.

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OPINIONS AND ORDERS BELOW

The opinion of the Fifth Circuit in Case Nos. 03-50506, 03-50560, is reported at *Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004) and is in the Appendix ("App.") at 1a-22a. The order and judgment of the district court (on remand from the first appeal to the Fifth Circuit in this case), entered on April 7, 2003 in Case Nos. A-01-CA-100-SS and A-01-CA-321-SS, are at App. 23a-50a and are unreported. The Fifth Circuit's decision, in the first appeal in this case (Case No. 01-50409), reported at *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240 (5th Cir. 2002) as amended on rehearing, is at App. 51a-93a. The previous order of the district court, entered on March 16, 2001 in Case No. A-01-CA-100-SS is at App. 94a-104a and is unreported.

Writs of garnishment against Petitioners ordered by the district court in this case and by other courts in Texas, in favor of Respondent and other creditors of the Congo—in *Af-Cap, Inc. v. Republic of Congo*, Case No. A-01-CA-100-SS (W.D. Tex.); *FG Hemisphere Assocs., L.L.C. v. Republique du Congo*, H-02-4261 (S.D. Tex.); and *Nat'l Union Fire Ins. Co. v. People's Republic of Congo*, No. 04-10728 (Dallas County, Tex.)—are at App. 105a-18a and are not reported.

The Fifth Circuit's order on rehearing of its opinion in *Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004), Nos. 03-50506, 03-50560, entered on November 1, 2004 and reported at 389 F.3d 503, is at App. 119a-21a.

JURISDICTION

On September 17, 2004, the Fifth Circuit entered its decision reversing the district court's dissolution of writs of garnishment and holding that property of the Congo is

not immune from attachment and execution under the FSIA. On September 30, 2004, Petitioners filed timely petitions for rehearing and for rehearing en banc pursuant to Fed. R. App. P. 40. On November 1, 2004, the Fifth Circuit clarified its decision on rehearing and denied the petition for rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The actions consolidated on appeal to the Fifth Circuit were removed under 28 U.S.C. § 1441(d) to the district court, which had jurisdiction pursuant to 28 U.S.C. § 1330(a).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976, as amended, provides in pertinent part:

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . . . [Sub-parts (1) through (7), setting forth the excep-

tions to immunity from attachment or execution under § 1610(a).]

STATEMENT

This petition presents a question of exceptional importance to the conduct of United States' foreign relations, which the lower court's interpretation of the Foreign Sovereign Immunities Act ("FSIA") now jeopardizes: do the immunity exceptions from attachment and execution under § 1610(a) of the FSIA, which are limited to property that is "in the United States," reach a foreign sovereign's property rights in its own natural resources within its own territory?

The court below decided that the FSIA authorizes the extraterritorial enforcement of a creditor's judgment against the sovereign rights of the Congo,[1] under Congolese law, to property consisting of the Congo's natural resources. The Fifth Circuit held that the Congo's right to receive its royalty share of oil, which is produced and delivered in the Congo, is property located "in the United States" because of the United States location—in addition to their locations in the Congo—of the companies obligated to the Congo for the royalty oil. The court's reading of the FSIA thus permits United States courts in private civil litigation to divest a sovereign's ownership and regulation of its natural resources in its own territory if the sovereign grants a concession for the production of its natural resources to a United States company.

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[1] The Republic of Congo, also referred to as "Congo-Brazzaville" and formerly known as the People's Republic of Congo, is not to be confused with the nation currently known as the Democratic Republic of Congo or "Congo-Kinshasa," which was formerly Zaire.

The Fifth Circuit's ruling circumvents the express geographic limitation of the term "in the United States" in § 1610(a), and conflicts with this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), which construed the same language in § 1605(a) of the FSIA as limiting its application to United States territory. The Fifth Circuit's contrary interpretation of the same limitation in the FSIA's attachment and execution provisions to property "in the United States" also conflicts with this Court's established rule of statutory construction against needlessly construing a federal statute in a manner that violates international law and infringes a foreign state's sovereignty in its own territory.

Finally, the decision below, by relying on state law to interpret the phrase "in the United States" in the FSIA, subjects a federal statute regulating U.S. foreign relations to the vagaries of state law "situs" rules, in conflict with both this Court's precedent and the rulings of other circuit courts. This Court has made clear that the FSIA preempts state law, and must be interpreted in light of the articulated federal policies underlying the statute and international law. Other circuit courts have expressly rejected the state law rule that the Fifth Circuit adopted in construing § 1610(a) of the FSIA—that "the situs of a debt obligation is the situs of the debtor"—where the situs ascribed to intangible property implicates foreign relations. The Fifth Circuit's ruling, by applying state law to its interpretation of the FSIA undermines the FSIA's purpose of protecting federal interests in sensitive foreign relations matters.

A. Statutory Background

The FSIA is a comprehensive regulatory statute that applies in every action against a foreign state and codifies the modern doctrine of "restrictive" foreign sovereign immunity recognized under international law. *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2248-49, 2254 (2004). Under the traditional doctrine of foreign sovereign immunity, a foreign state's immunity from attachment or execution against its property was absolute. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). The FSIA provides, in § 1609, that a foreign state's property in the United States is presumptively immune from attachment, subject to exceptions under § 1610 and § 1611. Under § 1610(a), the statute provides exceptions to the immunity from attachment of a foreign state's property "in the United States" that is "used for a commercial activity in the United States."

B. Factual And Procedural Background

This case is a garnishment action that was commenced in Texas state court against the Congo and garnishees that included CMS Nomeco Congo Inc., a Delaware corporation ("CMS"), The Nuevo Congo Company, a Delaware corporation, and Nuevo Congo Ltd., a Cayman Islands corporation (collectively, "Garnishees").[2] Garnishees are companies engaged in oil production in the Congo under a Convention with the Congo dated May 25, 1979 ("the Convention"). Garnishees (along with the Congo's state-owned oil company, non-party *Société Nationale des Pétroles du Congo*) are

[2] The facts set out herein are, for the most part, described by the opinion of the district court dated April 7, 2003, which was the subject of Af-Cap's appeal. App. 23a-46a. The Fifth Circuit upheld all of the district court's factual findings. App. 11a. All other relevant facts are supported by undisputed record evidence.

the working-interest owners in a concession (the "Marine I Permit," *see* App. 29a, 148a-49a), granted by the Congolese Government under the Convention.[3]

1. The Congo's Royalty Interest

The Convention governs the oil production operations under the concession and the terms of the Congo's "royalty" under the *Code Général des Impôts du Congo* (the General Tax Code of the Congo). App. 29a, 154a, 158a. A "royalty is the most basic and oldest known petroleum tax." Bernard Taverne, Petroleum, Industry And Governments: An Introduction To Petroleum Regulation, Economics And Government Policies 326 (2001). The royalty is "calculated as a percentage of the value of the oil," which "may be required to be paid in kind"—*i.e.*, by delivery of the royalty share of the oil to the sovereign, a feature of petroleum production regulation that was widely established by international practice at the time the Convention was executed in 1979. *Id.* at 329; Ewell E. Murphy, Jr., *Current Developments In International Petroleum And Mining*, 1981 A.B.A. Sec. Int'l L. 4-5. The Congo takes its royalty interest "in kind," pursuant to its election under the Convention. App. 29a, 34a.

The Convention was executed in the Congo and is governed by Congolese law. The oil is extracted from the submerged seabed adjacent to the Congo's coast, in areas within the Congo's sovereignty and exclusive jurisdiction under Congolese law and international law. *See* App. 29a, 148a, 185a. The oil flows through a subsurface pipeline system to a storage vessel in Congolese coastal waters.

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[3] Garnishees and SNPC are successors-in-interest to the parties that originally entered into the Convention with the Congo in 1979.

When the quantity of stored oil reaches a certain level, the oil is sold and off-loaded from the storage vessel onto an oil tanker chartered by the purchaser. *Id.* at 29a.

Garnishee CMS is the designated "Operator" under the Convention, and must deliver the royalty to the Congo in Congolese territory. No provision in the Convention calls for any performance in the United States by any party, nor provides for the jurisdiction of any court in the United States over a claim arising out of the Convention. Any dispute between Garnishees and the Congo must be resolved by arbitration in Geneva, Switzerland under the Rules of Arbitration of the International Centre for Settlement of Investment Disputes. App. 174a.

2. The Garnishment Proceedings

The garnishment proceedings were originally brought by Af-Cap's predecessor-in-interest, Connecticut Bank of Commerce ("CBC"), in aid of execution of a money judgment against the Congo arising from an unsecured loan the Congo had entered into in 1984, which has been in default since 1986. Respondent Af-Cap acquired the money judgment and substituted itself as plaintiff in 2002.

CBC asserted that Garnishees are indebted to the Congo for the royalty that accrues to the Congo and sought to garnish the "debts" for royalties that Garnishees owed to the Congo, in satisfaction of CBC's unrelated money judgment against the Congo and that such property was garnishable under § 1610(a)(1) of the FSIA.[4] CBC obtained writs of

[4] In the 1984 loan agreement, the Congo waived its immunity from attachment or execution. As a result, § 1610(a)(1) of the FSIA applies, and permits attachment or execution against property of the Congo, which is "in the United States" that is "used for a commercial activity in the United States."

garnishment, originally issued *ex parte* by the state court clerk, purporting to attach the Congo's right to receive its royalty share of oil produced and sold in the Congo under the Convention.

After removal, the Congo and Garnishees moved to dismiss the action on the ground that the FSIA did not authorize the attachment of the Congo's sovereign right to its royalty share of natural resources produced and sold in the Congo. The district court agreed that the Congo's royalty entitlement is "uniquely sovereign in nature" and that the Congo's "control over mineral and natural resources" is "a basic aspect of [its] sovereignty." App. 100a. The district court thus held that the garnishment of Congo's royalty entitlement could not be permitted by an immunity exception from attachment under § 1610(a) and accordingly dismissed the case in March 2001. *Id.* at 101a, 104a. CBC appealed.

3. The Fifth Circuit's First Decision

The Fifth Circuit's decision of CBC's appeal, in August 2002, confirmed that a foreign state's property is not subject to attachment under § 1610(a) of the FSIA unless the property is both "in the United States" and "used for a commercial activity in the United States," even where the foreign state has completely waived its sovereign immunity. App. 53a. The court of appeals held, however, that "[t]he district court (and the litigants) have focused on" the sovereign nature of the petroleum operations that "gave rise to" the Congo's royalty rights, and that "[t]his was the wrong question to consider." *Id.* at 61a. Instead, the district court should have considered the "use" of the royalty

rights because the immunity exception applied only to property "used for a commercial activity in the United States." *Id.* at 64a. The court of appeals vacated the district court's dismissal and remanded with instructions to conduct discovery and decide not what activity gave rise to the royalty obligation, but whether the Congo's royalty oil rights are "used for a commercial activity in the United States" under § 1610(a). *Id.* at 80a. CBC petitioned for rehearing, which the court granted in part and reaffirmed its holdings. App. 67a.

Petitioners cross-petitioned for rehearing and argued that remand to consider the "use" of the Congo's property was unnecessary because the undisputed facts showed that the Congo's royalty entitlement to oil produced in Congolese territory was not "in the United States." Petitioners urged the Fifth Circuit to affirm the dismissal based on the dispositive "situs" limitation under § 1610(a). Since § 1610(a) of the FSIA explicitly limits its application to property "in the United States," the location of the property is a threshold inquiry that must precede determination of how the property is used. Petitioners argued that the situs of the Congo's entitlement under Congolese law to its royalty share of oil in Congolese territory could be resolved on undisputed facts, eliminating the need for judicial intrusion into the Congo's use of its sovereign property that the FSIA was designed to avoid. The court of appeals denied the petition, although it conceded that it "neglected to address explicitly one of the two prongs of analysis under 28 U.S.C. § 1610(a)" by "address[ing] the second of these clauses, but not the first." App. 89a. Nevertheless, it held "this omission does not require any change to the mandate . . . [because] [t]he factual question of what the . . . obligations are 'used for' appears much less difficult on this

record than the legal question of determining the situs of the intangible royalty obligations." *Id.* at 90a.

On remand, after acquiring CBC's money judgment, Respondent took extensive discovery and then moved for permission to execute on the Congo's right to its royalty entitlement that Garnishees owed. The district court denied Respondent's motion, holding that the Congo's use of its property did not satisfy § 1610(a), without addressing the question of whether the property was "in the United States." App. 45a-46a. Respondent appealed to the Fifth Circuit, and Petitioners urged the court to affirm based on the district court's findings, as well as the alternative ground that the situs of the Congo's intangible royalty rights is not "in the United States."

4. The Fifth Circuit's Second Decision

On the second appeal, a quorum of a different panel of the Fifth Circuit reversed the district court's determination that the Congo's property is not "used for a commercial activity in the United States" under § 1610(a) of the FSIA. The court reversed this conclusion because in 1991, to settle a prior debt owed to the National Union Fire Insurance Company ("NUFI"), the Congo assigned to NUFI one-half of the proceeds of each royalty receivable that accrued until the debt to NUFI was paid. App. 11a, 15a-16a. NUFI was never a party to the Convention, but received payments under the settlement until its debt was repaid in August 2002, at which point the assignment to NUFI expired by its terms. The Fifth Circuit upheld the district court's findings of fact, but determined, contrary to the district court, that the 1991 assignment to NUFI rendered

the Congo's royalty rights permanently subject to attachment.

The Fifth Circuit then held that the Congo's intangible right to its royalty share of oil is property of the Congo "in the United States." The court decided that because the Congo's intangible royalty rights were also the "debts" of Garnishees who were located in the United States, the situs of the Congo's intangible property is "in the United States" because "the situs of a debt obligation is the situs of the debtor." App. 18a. The Fifth Circuit therefore held that the Congo's sovereign right to receive its royalty oil is "in the United States" and "used for a commercial activity in the United States," and therefore subject to garnishment under § 1610(a)(1) of the FSIA.

Petitioners filed petitions for rehearing and for rehearing *en banc*. On November 1, 2004, the panel granted the petition for rehearing in a short opinion limited to its error regarding an undisputed issue of fact. App. 120a-21a. On rehearing, the quorum did not address the arguments raised against the quorum's "situs" ruling, and the petition for rehearing *en banc* was denied. *Id.*

After the Fifth Circuit's second decision and the issuance of its mandate on November 1, 2004, writs of garnishment were issued by the district court in this case, and by other courts in Texas, in favor of both Af-Cap and other creditors of the Congo, to attach the Congo's right to royalty oil in Congolese territory, in aid of execution of money judgments for unrelated debts. *See* App. 105a - 18a.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S CONSTRUCTION OF THE TERM "IN THE UNITED STATES" CONFLICTS WITH THIS COURT'S PRECEDENTS

A. This Court Has Held That "In The United States" Under The FSIA Means "Within The Territorial Jurisdiction Of The United States"

To determine whether the Congo's right to receive its royalty oil is subject to garnishment under the FSIA as property "in the United States," it is necessary to ascribe a situs to the Congo's intangible property right. The Fifth Circuit adopted a state law "rule ordinarily applied to determine the situs of debtor obligations," and held that "the situs of a debt obligation is the situs of the debtor." App. 18a - 19a. The Congo's royalty rights were therefore ascribed a situs "in the United States" because of the U.S. location of the Congo's "debtors" obligated to the Congo for its royalty oil. *Id.* The court acknowledged that its situs rule is used in ordinary domestic garnishment cases that do not involve the foreign relations context of this case, and "agree[d] that the two contexts implicate different issues and interests." App. 19a-20a. Nevertheless, it saw "nothing about the general rule regarding the situs of debt obligations that would frustrate the purpose of the FSIA, which is to 'limit as much as possible disrupting the 'public acts' or '*jure imperii*' of sovereigns.'" *Id.* at 20a.

The Fifth Circuit's determination of what it means for property to be located "in the United States" conflicts with this Court's interpretation of the same term under § 1605(a)(5) of the FSIA in *Amerada Hess*. In that case, the Court held that the term "in the United States," under the exception to

immunity from suit for torts occurring "in the United States," refers to the geographical area that is "within the territorial jurisdiction of the United States." *Amerada Hess*, 488 U.S. at 441. The Court rejected an interpretation that imputed an extraterritorial scope to the term, holding that the statutory language, which refers to tort claims for damage to property occurring "in the United States," did not evince a legislative intent that the provision apply to injuries occurring outside of U.S. territory. *Id.*

The Fifth Circuit's decision conflicts with *Amerada Hess* because it authorizes the attachment of a foreign state's property that is not "within the territorial jurisdiction of the United States." *C.f. Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (Under "the 'normal rule of statutory construction' . . . 'identical words used in different parts of the same act are intended to have the same meaning'" because "every Act of Congress, should not be read as a series of unrelated and isolated provisions") (quoting *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). The property at issue is the Congo's right to receive its royalty share of oil that is subject to the Congo's sovereignty and exclusive jurisdiction over its natural resources under international law and Congolese law,[5] as well as federal law. *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States §§ 511-12, 514-15 (1987) (the economic exploitation of natural resources in a state's coastal waters is subject to the state's

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[5] *See* Ordinance No. 049/77 of 20 December 1977, amending article 2 of Ordinance 26/71 of 18 October 1971, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/COG_1971_Ordinance.pdf.

sovereignty and exclusive jurisdiction);[6] *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 480-83 (1981) (confirming exclusive jurisdiction and sovereignty of the United States over the exploitation of and revenues from natural resources from the seabed of its coastal waters). It necessarily follows that the right to receive the royalty is not "within the territorial jurisdiction of the United States," and therefore not "in the United States".

The Fifth Circuit's holding assumes that because the Congo's obligors were located in the United States, the Congo's intangible property rights are "in the United States" under the FSIA. The court's holding necessarily implies that although the Congo's tangible oil is within the territory and exclusive jurisdiction of the Congo, its intangible rights therein can somehow be located "in the United States." But the Congo's sovereignty and exclusive jurisdiction over its natural resources perforce includes its rights and revenues in connection with their economic exploitation. A sovereign state "must have powers of dominion and regulation in the interest of its revenues." *United States v. California*, 332 U.S. 19, 35 (1947). Neither federal law nor international law permits the Fifth Circuit's artificial separation of the Congo's intangible right to its royalty oil from the tangible royalty oil in Congolese territory, purporting thereby to divest the Congo's sovereign right to the latter. *Id.*; *see also United States v. Texas*, 339 U.S. 707, 717, 719 (1950) ("Dominion over navigable waters and property in the soil under them are so identified

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[6] *See* Convention on the Continental Shelf, Apr. 29, 1958, arts. 1-2, 15 U.S.T. 471, 499 U.N.T.S. 311; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (1982) arts. 56-58, 60, 77-81; *see also* Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

with the sovereign power of government that a presumption against their separation from sovereignty must be indulged," and "property interests are so subordinated to the rights of sovereignty as to follow sovereignty.").

The Fifth Circuit's decision failed to follow this Court's precedents and misinterpreted the FSIA in ruling otherwise.

B. The Fifth Circuit's Construction Of The FSIA Contravenes This Court's Precedents Against Construing Federal Statutes So As To Violate International Law

In reliance on the Fifth Circuit's decision and mandate, writs of garnishment were thereafter issued by several courts in Texas in favor of both Af-Cap and other creditors of the Congo to enforce money judgments on unrelated debts against the Congo's rights to its royalty oil in Congolese territory. App. 105a-18a. These extraterritorial enforcement measures, purporting to divest the Congo's sovereign rights to property within its exclusive jurisdiction, are not entitled to legal effect in the Congo. *See, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens. . . ."); *see also The Apollon*, 22 U.S. 362, 370 (1824) (Story, J.) ("The laws of no nation can justly extend beyond its own territories . . . . They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."); Restatement (Third) of Foreign Relations Law of the United States § 206 cmt. b (1987) (a sovereign state has "lawful control over its territory generally to the exclusion of other states").

The American courts' purported exercise of enforcement power in Congolese territory, to which the Fifth Circuit's decision opened the door, violates the fundamental principle of sovereign independence under international law. *See, e.g.*, Restatement (Second) of Foreign Relations Law of the United States § 44 (1965).

By construing the FSIA to permit this result, the decision below also conflicts with this Court's decisions establishing the rule of statutory construction that " 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains,'" to avoid "unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) (quoting *Murray v. The Charming Betsy*, 6 U.S. 64 (1804)); *see also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); Restatement (Third) of Foreign Relations Law of the United States § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."). This rule of construction "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffman-La Roche*, 124 S. Ct. at 2366.

This Court's construction of "in the United States" in *Amerada Hess* establishes that there is "another possible construction" of the FSIA that would be consistent with international law. Thus, the "language of the [FSIA] is readily susceptible of . . . [an] interpretation [that] is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories."

F. Hoffman-La Roche, 124 S. Ct. at 2373 (Scalia, J., concurring). Review should be granted to correct the Fifth Circuit's contravention of this "important component of the legal regime defining the U.S. relationship with international law . . . . [which] is applied regularly by the Supreme Court." Curtis A. Bradley, *The Charming Betsy Canon And Separation Of Powers: Rethinking The Interpretive Role Of International Law*, 86 Geo. L.J. 479, 482-83, 485 (Jan. 1998); Ernest A. Young, *Sorting Out The Debate Over Customary International Law*, 42 Va. J. Int'l L. 365, 477-79 (Winter 2002); Ralph G. Steinhardt, *The Role Of International Law As A Canon Of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103, 1161-62 (May 1990).

C. This Court Has Precluded The Application Of State Law To Interpret The FSIA

The decision below ascribes a United States situs to the Congo's intangible property based upon state law principles developed outside of, and without contextual relevance to, the FSIA or any issue of foreign relations. This approach violated the well settled principle that "state law may not be allowed to 'interfer[e] with the conduct of our foreign relations.'" *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 (2003) (quoting *United States v. Pink*, 315 U.S. 203, 234 (1942) (Frankfurter, J. concurring)) (alteration in original). Foreign relations "must be treated exclusively as an aspect of federal law." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

Justice Frankfurter specifically criticized the application of a state law situs rule where foreign relations are implicated:

> Legal ideas like other organisms cannot survive severance from their congenial environment. Concepts like 'situs' and 'jurisdiction' . . . summarize views evolved by the judicial process, in the absence of controlling legislation, for the settlement of domestic issues. To utilize such concepts for the solution of controversies international in nature, even though they are presented to the courts in the form of a private litigation, is to invoke a narrow and inadmissible frame of reference.

United States v. Pink, 315 U.S. 203, 234 (1942) (Frankfurter, J. concurring). Justice Frankfurter emphasized in particular:

> We are dealing with intangible rights, with choses in action . . . . As between the states, due regard for their respective governmental acts is written into the Constitution by the Full Faith and Credit Clause....[which] has given rise to a long history of judicial subtleties which hardly commend themselves for transfer to the solution of analogous problems between friendly nations. . . .

Id. at 239-40. Consequently, "no invocation of a local rule governing 'situs' . . . however applicable in an ordinary case," should be permitted to control questions of federal law that implicate national foreign relations. *Id.* at 240. (Frankfurter, J. concurring)

For the same reason, this Court has repeatedly directed that the task of resolving issues arising under the FSIA, as well as other statutes concerning foreign relations, "preclude[s] the application of [state] law," and instead must be "guided by the policies articulated by Congress in

enacting the FSIA" and "necessarily informed both by international law principles and by articulated congressional policies." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 621, 622-23, 623 n.10 (1983); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) ("FSIA 'intended to preempt any other State and Federal law . . . for according immunity to foreign sovereigns"); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94, 497 (1983) (the FSIA, "govern[s] foreign sovereign immunity as an aspect of substantive federal law" as to which "the primacy of federal concerns is evident," and "will generally require interpretation of numerous points of federal law."). *See generally Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("[In] international disputes implicating . . . our relations with foreign nations . . . . our federal system does not permit the controversy to be resolved under state law" because the "international nature of the controversy makes it inappropriate for state law to control.").

Despite this, the Fifth Circuit applied a state law rule "that the situs of a debt obligation is the situs of the debtor," on the ground that this was "the rule ordinarily applied," and that "[t]his is certainly true in Texas, where this garnishment proceeding commenced." App. 18a-19a. The Fifth Circuit's contradiction of this Court's precedent warrants review for this reason as well.

II. THE FIFTH CIRCUIT'S RELIANCE ON STATE LAW TO DETERMINE THE SITUS OF INTANGIBLE PROPERTY UNDER THE FSIA CREATES A CONFLICT BETWEEN THE CIRCUIT COURTS

Until the decision below, each circuit court considering the situs of intangible property in cases involving a foreign state or implicating international relations has consistently applied federal law standards to determine the intangible property's situs. *See, e.g., Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1334, 1338 (9th Cir. 1985). The Court should grant review to resolve the conflict between circuits created by the Fifth Circuit's reliance on state law to determine whether the situs of the Congo's intangible property is in the United States or in a foreign country.

As courts have long recognized,

> The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. . . . At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions.

Severnoe Sec. Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 123-24 (1931) (Cardozo, J.). Accordingly, courts established a "rule of federal law to determine" the situs of "intangible property [involving] the overriding concern of international relations of the United States." *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir. 1968). In cases where the situs determination is imbued with this "overriding national concern," the underlying foreign relations considerations inform the situs determination, rather than "narrow rules developed in other contexts." *Callejo v. Bancomer, S.A.* 764 F.2d 1101,

1122 (5th Cir. 1985). The decision below, however, expressly declined to consider a "different sort of situs calculus" from the state law rule it chose. App. 19a-20a.

Under federal standards established in several circuits, the situs of an intangible debt is with the sovereign that has control over the debt by virtue of its control over property located within its territorial dominion. *See, e.g., Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 224-25 (2d Cir. 1985); *Tchacosh*, 766 F.2d at 1336-39. The Seventh Circuit expressly rejected the rule adopted by the Fifth Circuit in this case, holding that to determine the situs of the debt based on the situs of the debtor was "a clearly untenable proposition." *F. & H.R. Farman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co.*, 882 F.2d 281, 286-87 (7th Cir. 1989) (Posner, J.). If the debtor's location in the United States made the debt's situs "in the United States," "[a] dispute between an Iranian corporation doing business entirely in Iran, and the government of Iran, could pop up in an American court merely because the corporation was owed some money by an American firm," which would subvert the federal policy to "minimize [judicial] interference with . . . foreign relations." *Id.* The Ninth Circuit in *Tchacosh* also rejected the proposition that "[the] debt ha[d] its situs with the debtor" where "[t]he only connection the relationship between [the debtor and creditor] had to the United States is that [the debtor] is incorporated under United States law, and has a place of business in this country." *Tchacosh*, 766 F.2d at 1336, 1338.

The Fifth Circuit's reliance on state law on the basis that this Court "recognized" the "general operation" of the state law situs rule in *Harris v. Balk*, 198 U.S. 215 (1905) (App. 19a), misapplied that decision to the international

context of the FSIA. *Harris v. Balk* involved "ordinary debts," and the Court expressly stated that ascribing a "situs" to such debts was "unimportant." *Harris v. Balk*, 198 U.S. at 223. *Harris* explicitly acknowledged the domestic context to which its reasoning was limited, premised on the fact that the Garnishor's "judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment." *Id.* at 221. For that reason, determining whether the "situs" of such ordinary debts was in North Carolina or Maryland was "unimportant."[7] By contrast, the Full Faith and Credit Clause does not extend over the territory of a foreign state and does not supersede the Congo's sovereignty. A sovereign has full dominion over its interests in its natural resources, "and is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property." *United States v. California*, 332 U.S. at 35, 39.

The Court in *Harris* also presumed that the judgment debtor "had the right to sue Harris [the garnishee] in Maryland to recover the debt which Harris owed him." 198 U.S. at 223. Like the Full Faith and Credit Clause rationale, this aspect of *Harris* contrasts sharply with this case because the Congo could *not* sue Garnishees in *any* court in the United States to recover royalties owed to the Congo (even if there were not an exclusive arbitration clause in the Convention). The royalty entitlement under the Convention and the Congo's General Tax Code serves to produce

[7] Indeed, the issue that *Harris v. Balk* primarily addressed was overruled by *Shaffer v. Heitner*, 433 U.S. 186, 208-09 (1977), in which this Court held that the basis for quasi in rem jurisdiction cannot rest solely on the presence of property of the defendant that is "completely unrelated to the plaintiff's cause of action." *Id.*

public revenues to the government, and the Congo would be prevented from recovering royalties from Garnishees in a United States court by the "revenue rule," "a long established feature of the law of the United States and other nations." *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106 (2d Cir. 2001). Under the revenue rule, courts in the United States (and other nations) will not adjudicate or enforce a claim brought by a foreign state to recover under a revenue law or tax of the foreign state. *See id.; see also Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1256-58 (11th Cir. 2003). Relying on *Harris* to determine the situs of the Congo's property under the FSIA, even though the revenue rule renders *Harris*' underlying rationale inapplicable, not only defies common sense, but creates an exception to the revenue rule that would allow a foreign state's creditor to enforce the foreign state's tax laws in American courts, while the foreign state itself cannot.

III. THE IMPORTANCE OF THE QUESTION RAISED IN THIS PETITION WARRANTS REVIEW

A. The Decision Threatens The United States' Relations With The Congo And With Other Foreign States

The decision below authorizes judicial enforcement measures that infringe a foreign state's sovereignty, affronting the foreign state to the detriment of United States foreign relations. An American court's order purporting to divest a foreign state's rights to public assets in its own territory is viewed by the Congo, and would be correctly viewed by other foreign states, as a violation of the foreign state's sovereign independence.

The "strong, positive, and cooperative,"[8] relations between the United States and the Congo, are frustrated by the Fifth Circuit's disregard of the "principle of supreme state sovereignty over natural resources," particularly since "[o]il revenues represent [the Congo's] only significant source of income," and "[c]onsideration of their sovereignty cannot be separated from [the Congo's] near total dependence upon oil."[9] *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC* ("IAM"), 649 F.2d 1354, 1358, 1361 (9th Cir. 1981). The Congo's rights to royalty oil are "'affected with the public interest,'" and is a "'good[] in which only the sovereign may deal.'" *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1187 (2003) (quoting *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989)); *accord California v. NRG Energy, Inc.*, 391 F.3d 1011 (9th Cir. 2004).

Interference with the Congo's primary public asset necessarily strikes at its most vital economic and sovereign interests. *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997). Relations between the U.S. and the Congo are ill-served by American courts interfering with the Congo's sovereign functions by purporting to deprive the Congo of its "chosen means of allocating and profiting

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[8] Background Note: Republic of the Congo, U.S. Department of State, Bureau of African Affairs, http://www.state.gov/r/pa/ei/bgn/2825.htm.

[9] "Oil accounts for about 67% of Congo's real gross domestic product (GDP)—about 78% of the government budget—and about 95% of Congo's export earnings . . . ." U.S. Dep't of Energy, *Congo-Brazzaville Country Analysis Brief* 1 (Sept. 7, 2004), http://www.eia.doe.gov/emeu/cabs/congo.pdf.

from its own valuable natural resources." *IAM*, 649 F.2d at 1361.

B. The Decision Would Undermine Important Foreign Policies Of The United States

"[T]he availability of oil . . . [is] a significant factor in international relations." *IAM*, 649 F.2d at 1360 (9th Cir. 1981). The "U.S. Energy Policy With Regard to Africa" identifies the Congo as one of six West African oil-producing nations that will "play[] an increasingly important role in our energy security." [10] The initiative "to promote a more receptive environment for U.S. oil and gas trade, investment and operations" in West African oil producing states demonstrates that relations in this regard "are carefully considered in the formulation of American foreign policy." *Id.* at 1361. The Fifth Circuit's decision impairs this initiative by deeming the Congo's intangible rights to its primary source of public revenue "in the United States" and vulnerable to attachment unless the Congo categorically excludes United States companies from participating in the development of its petroleum resources.

This frustration of United States economic foreign policy resulting from the Fifth Circuit's decision will have widespread impact affecting relations with foreign states worldwide by creating new risks and potential instability with respect to the participation of U.S. investors and businesses in foreign states. United States policy towards

[10] Statement of John R. Brodman, Deputy Assistant Secretary for International Energy Policy, Office of Policy and International Affairs, U.S. Department of Energy, Before the Subcommittee on International Economic Policy, Export and Trade Promotions, Committee on Foreign Relations (Oct. 27, 2003), http://www.usembassy.it/file2003_10/alia/a3102708.htm.

developing states promotes the participation of this country's private sector through private-public partnerships in developing states as a primary means of development.[11] Such partnerships involving United States companies and foreign public entities would be vulnerable to these risks, and unattractive to foreign states whose public revenue receivables owed by United States businesses could be subject to garnishment by American courts. The prospect of being sued as a garnishee and forced into burdensome and expensive litigation would also provide a disincentive for United States businesses to participate in projects with and in the Congo and other developing countries. This case aptly illustrates the risks to which a United States company, operating in foreign territory and under foreign law, is now exposed in the form of garnishment actions by the foreign state's creditors to collect on completely unrelated debts.

Furthermore, the decision below could jeopardize efforts supported by the United States, and by the International Monetary Fund ("IMF") and the World Bank, to restructure the external public debt of the Congo, and other countries. The Congo is one of 38 countries designated by the IMF and World Bank as "Heavily Indebted Poor Countries" ("HIPC"), and is eligible for reduction of its unsustainable debt and poverty relief through an HIPC initiative. The United States supports the HIPC initiative and related multilateral programs "to help clear arrears of post-conflict heavily indebted poor countries" such as the Congo which have experienced major civil conflict in the last 10

[11] *See, e.g.*, U.S. Treasury Secretary John W. Snow, Development Committee Statement for the Record (Oct. 2, 2004), http://www.ustreas.gov/press/releases/js1987.htm.

years, specifically emphasizing that "the Republic of Congo . . . could benefit from such a framework as [it] attempt[s] to normalize relations with official donors and establish economic stability."[12] The United States also has opposed enforcement mechanisms by which creditors "try to extract through litigation concessions from sovereign debtors" instead of "through good faith negotiations."[13] The Fifth Circuit's expansive construction of § 1610(a) multiplies the property of foreign states deemed to be "in the United States," and encourages litigation, rather than voluntary negotiation, to collect from HIPCs. The decision below significantly increases the incentive of secondary market creditors like Af-Cap to purchase distressed public debt at steep discounts, and profit by bringing garnishment actions against United States companies.

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[12] Remarks by John B. Taylor, Under Secretary for International Affairs of the U.S. Treasury, at the Annual Meetings of the African Development Bank (May 25, 2004), http://www.treas.gov/press/releases/js1698.htm.

[13] Statement of Interest of the United States (Sept. 8, 1994), in *CIBC Bank & Trust Co. (Cayman) Ltd. v. Banco Cent. do Brasil*, 886 F. Supp. 1105 (S.D.N.Y. 1995) (No. 94 Civ. 4733) at 17. *See also* Resolving Financial Crises In Emerging Market Economies, Treasury Undersecretary For International Affairs Timothy F. Geithner (Oct. 23, 2000), http://www.treas.gov/press/releases/ls966.htm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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